BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2018-318-E - ORDER NO. 2019-454

OCTOBER 18, 2019

IN RE:	Application of Duke Energy Progress, LLC for Adjustments in Electric Rate Schedules and Tariffs and Request for an Accounting Order	) ORDER GRANTING IN) PART AND DENYING IN) PART MOTIONS FOR) REHEARING AND) RECONSIDERATION

This matter comes before the Public Service Commission of South Carolina ("Commission" or "PSC") upon the timely Petitions for Rehearing or Reconsideration filed pursuant to S.C. Code Ann. Sections 1-23-380 and 58-27-2150 and S.C. Code Ann. Regs. 103-825 (A)(4). Petitions to rehear or reconsider Commission Order No. 2019-341 ("Order") were filed by the South Carolina Energy Users Committee ("SCEUC"), the South Carolina Office of Regulatory Staff ("ORS"), and Duke Energy Progress, LLC ("Company," "DEP," or "Duke Energy"). The Commission finds that no rehearing of the evidence is necessary in this instance, but that, based upon a full review of the written arguments presented by the parties, in conjunction with a review of the record in this case, certain modifications to and clarifications of Order No. 2019-341 are warranted. This order sets out the Commission's changes to Order No. 2019-341, and to the extent that any rulings within this order conflict with Order No. 2019-341, this order supersedes the prior order. Any matters not specifically addressed in this order remain unchanged. Our holdings herein and the holdings contained in Order No. 2019-341 which remain unchanged are all supported by the entire record of this case.

We address each of the petitions below.

Petition of the South Carolina Energy Users Committee

The two points raised by SCEUC's petition may be summarized as asking for differing treatment of the recovery for the coal ash remediation costs at the H.B. Robinson coal plant and of the Real Time Pricing Tariff offered by the Company. Commission Order No. 2019-341 awarded recovery of coal ash remediation costs to the Company. These costs were incurred pursuant to a Consent Agreement entered by the Company and the South Carolina Department of Health and Environmental Control in September 2014. The Consent Agreement is valid, having been entered pursuant to SCDHEC's authority under the South Carolina Hazardous Waste Management Act, S.C. Code. Ann § 44-56-10, *et seq.*, the Pollution Control Act, S.C. Code Ann. § 48-1-10 *et seq.*, and the South Carolina Solid Waste Policy and Management Act, S.C. Code Ann. §44-96-10, *et seq*. The Commission found then, and continues now, to consider such costs reasonable and prudently incurred, and subject to recovery. This issue is discussed further in Order No. 2019-341 at pages 45-46.

Next, SCEUC has requested that the Commission require the Company to implement market-based real-time pricing. The real-time pricing ("RTP") tariff is a voluntary rate option that offers large customers the opportunity to purchase incremental energy at a rate calculated based upon the Company's marginal cost of the generator that is expected to serve the next kWh of system load based upon all available generating plants. It is not intended to be a proxy for wholesale market-based pricing, or to be a mechanism for the Company to shop the wholesale market for low cost electricity on behalf of RTP customers and allow them to choose between the current wholesale market price and a rate based upon the

Company's marginal cost to generate an additional kWh. (Tr. p. 709-21 – 709-23.) See Wheeler Rebuttal at pages 21-23. For these reasons, the Commission declines to require the Company to alter or amend its RTP tariff program at this time.

Petition of the Office of Regulatory Staff

The ORS made several requests for clarification from Order No. 2019-341. The issues were not necessarily contested matters, but rather, ORS sought specific enumeration of values for certain elements of the Company's Application. Those clarifications are as follows:

1. We clarify that the rate base is $1,477,356,000, and the net income for return is $103,271,000.

2. We clarify that the Company, for purposes of this rate case, is to use the Cost of Service Study presented by the Company to allocate all revenues, expenses, and rate base items and to design rates for all customer classes, unless otherwise specified by the Commission.

3. We clarify that the Commission intended to order a 75% disallowance of the $351,000 of Lynn Good's executive compensation allocated to South Carolina ratepayers – a net allowance of $88,000, rounded, with all attendant adjustments as recommended by the ORS in its petition.

4. We clarify that the Commission disallows the $178,000 of non-allowable expenses remaining in dispute.

5. We correct a clerical error. The Company's accounting Order No. 2018-553, not Order No. 2018-552 should be, and is, declared null and void.

6. We clarify that the AMI deferral continuation sought by the Company is granted, subject to the deferral treatment outlined in section IV.K of the Order.

7. We clarify and amend section IV.L of the Order to include Adjustment #18. The remainder of the coal ash deferral not addressed in section IV.B of the Order, including the non-Asset Retirement Obligation amount, should be afforded the same treatment as ordered in section IV.K of the Order.

8. We clarify that the Commission explicitly approves the Grid Modernization Deferral, as stipulated between the ORS and the Company.

9. ORS has also challenged the sufficiency of the notice given to customers of the proposed rate increase, arguing that the dramatic decrease in Base Facility Charge ("BFC") rates and the resulting increase in volumetric rates requested after the issuance of the initial notice to customers of the proposed new rates made the initial notice inadequate to afford them the opportunity to determine how they would be affected and whether they should intervene or otherwise oppose the new rates. ORS requested that the Commission require the Company to issue new notices and hold rehearing limited to the issue of the effect of the BFC on volumetric rates, and it stated that a hearing would not be necessary if no customer requested one.

We find that the notice of the Company's proposed rate increase conforms with the requirements of due process, and we therefore reject ORS's request that we require the issuance of a new notice and hold a limited rehearing. The South Carolina Supreme Court has held that substantial prejudice must be shown to establish a due process claim. *Tall Tower, Inc. v. S.C. Procurement Panel*, 294 S.C. 225, 233, 363 S.E.2d 683, 687 (1987). The

Court has also made it clear that due process is flexible and calls for such procedural protections as the situation requires. *Kurschner v. City of Camden Planning Dep't*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008). The ORS has not demonstrated such prejudice here. Put most simply, due process in this case does not require that the proposed rates stated in the Company's initial application foreclose adjustment of component elements of its proposed charges in response to customer concerns. In this case, all the stakeholders had adequate notice of the additional revenue the Company was requesting, since the revenue request contained in the initial notice exceeded the actual revenue awarded.

In this docket, eleven parties intervened, including influential advocacy groups like the S.C. State Conference of the National Association for the Advancement of Colored People ("NAACP"), Upstate Forever, the Sierra Club, and the South Carolina Coastal Conservation League. Many of these groups participated in this proceeding in a representative capacity, advocating for customers. These groups brought substantial expertise to the proceeding and offered expert testimony on the issue of the proposed BFC. These experts clearly and unmistakably understood the inverse relationship between the reduction in the BFC they were advocating and an increase in the volumetric component of the Company's proposed rates. It is significant that none of these parties has joined the ORS in its concern about the purported problem with the notice provided in the proceeding. Additionally, hundreds of customers filed letters of protest with the Commission, and hundreds more attended the two public night hearings held in Sumter and Florence. We find that the level of participation in the case by both the intervenors and by individual customers demonstrates that the notice given of the requested rate increase was sufficient to meet the

standards for due process. We therefore affirm the finding of adequacy of notice in Commission Order No. 2019-341 at page 20

Petition of Duke Energy Progress, LLC

The Company's petition seeks rehearing or reconsideration on effectively five matters: coal ash remediation and disposal costs; treatment of deferrals; return on equity; coal ash litigation expenses; and CertainTEED litigation costs.

1. Coal Ash Remediation Costs

The Company asserts that the Commission's decision to disallow portions of the coal ash remediation costs – especially those costs incident to the passage of the North Carolina Coal Ash Management Act ("CAMA") – prejudices the Company's substantial right to recover its expenses of providing service to the public. This issue is fully discussed in Commission Order No. 2019-341 at pages 39-52.

The Commission's decision to disallow recovery of $333,480,308 in coal ash remediation and disposal costs ("Coal Ash Costs") is supported by the substantial evidence on the whole record and appropriate. The unpermitted discharge by Duke Energy of approximately 27 million gallons of coal ash wastewater and an estimated 39,000 tons of coal ash into the Dan River played a deciding role in the development of CAMA in its present form, not only accelerating the timing of action required, but also limiting the options to remediate and close coal combustion residuals impoundments more than would eventually occur under the Federal Coal Combustion Residuals ("CCR") Rule. (R. p. 1115-15, ll. 13-23). Information exposed in the Duke Energy federal plea deal revealed that on two separate occasions, Duke Energy engineers at the Dan River plant requested an

immaterial amount of budget funding to pay for video equipment to scope the pipe that later failed. (R. p. 1004-34, 11. 11-14). Duke Energy engineers were denied their request. (R. p. 1004-34, ll. 14-15). In response to the Dan River spill, the North Carolina Legislature passed CAMA that required the closure of existing coal ash ponds as well as conversion from wet ash to dry ash handling. (R. p. 1004-34, 11. 17-20).

ORS witness Witliff testified that Duke Energy Carolinas, LLC ("DEC") and DEP were criminally and civilly negligent in their operations and maintenance of the impoundments for years prior to the enactment of CAMA, confirming that DEC and DEP failed to responsibly address and correct these issues adequately -- and consequently in a much less costly -- manner than it is currently being required to do. (R. p. 1115-16, ll. 16-22). DEC's State President for South Carolina, Kodwo Ghartey-Tagoe, acknowledged in his testimony that in 2015, the Company pled guilty to violations of the Clean Water Act and its regulations as part of the criminal investigation following the Dan River spill. (Tr., p. 378). Duke Energy management made specific decisions that resulted in the coal ash spill in North Carolina, that in turn, led to the creation of CAMA. (R. p, 1004-38, 11. 32-33). North Carolina's CAMA is significantly more restrictive and stringent than the federal CCR Rule. (R. p. 1115-21, 11. 21-22).

Additionally, witness Wittliff testified that North Carolina's CAMA rules resulted in additional expenses being incurred at DEP's Asheville and Sutton plants, due to a more accelerated closure schedule than the federal CCR rule would have otherwise required. (R. p. 1115- 23, 11. 4-120). Regarding costs incurred at the DEP plant H.F. Lee, witness Wittliff testified that DEP's beneficiation project at H.F. Lee falls under the "CAMA-only"

category, and the ratepayers of South Carolina should not have to reimburse the Company for expenses related to North Carolina's CAMA-only beneficiation requirement. (R. p. 1115-36, 11. 1-4). According to witness Wittliff, the federal CCR rule does not require beneficiation and as a result, no savings could accrue to customers as a result of beneficiation performed pursuant to North Carolina's CAMA. (R. p. 1212, 11. 5-10). Regarding costs incurred at the DEP plant Sutton, witness Wittliff testified that the federal CCR rule does not require the closure of Sutton and therefore he reasonably concluded that the closure of Sutton was directed by North Carolina's CAMA and the North Carolina court orders mentioned by DEP witness Kerin. (R. p. 1115-37, ll. 16-21).

Regarding costs incurred at the DEP plant Asheville, witness Wittliff testified that the extent of compliance measures undertaken by DEP to comply with North Carolina's CAMA and other North Carolina laws resulted in much greater costs than what the federal CCR rules would have required. (R. p. 1115- 40, 11. 7-19). Regarding costs incurred at the DEP plant Weatherspoon, witness Wittliff testified that DEP has represented its Weatherspoon efforts as beneficiation, which is not required under the CCR rule. (R. p. 1115-42, 11. 21-23).

DEP directly assigns certain costs to its North Carolina and South Carolina jurisdictions and often these costs are derived from laws and regulations specific to that jurisdiction. (R. p. 1099-6, ll. 10-16). Additionally, the Company has already excluded certain costs from this proceeding that were incurred due to North Carolina law including: recovery of certain costs that are associated with the provision of drinking water to North Carolina residents, the costs to comply with the North Carolina Clean Smokestacks Act,

North Carolina Renewable Portfolio Standards, and the North Carolina Competitive Energy Solutions for NC (HB.589) laws. (R. p. 1101-9, 11. 1- 5). Finally, the South Carolina General Assembly has not passed legislation that is similar to North Carolina's CAMA. (R. p. 1115-21, l. 8-9).

"The party challenging a PSC order must establish that (1) the PSC decision is not supported by substantial evidence and (2) the decision is clearly erroneous in light of the substantial evidence in the record." *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 109, 597 S.E.2d 105, 109 (2004). "Because the Commission's findings are presumptively correct, the party challenging the Commission's order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole." *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010). Although the burden of proof in showing the reasonableness of a utility's costs that underlie its request to adjust rates ultimately rests with the utility, the South Carolina Supreme Court has concluded that the utility is entitled to a presumption that its expenses are reasonable and were incurred in good faith. *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 422 S.E.2d 110 (1992) (internal citations omitted). However, that presumption is not dispositive; the burden remains on the utility to demonstrate the reasonableness of its costs, and the presumption in a utility's favor clearly does not foreclose scrutiny and a challenge. *Utils. Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 109, 708 S.E.2d 755, 762 (2011). "The ultimate burden of showing every reasonable effort to minimize [] costs remain on the utility." *See Hamm*, 309 S.C. at 286, 422 S.E.2d at 113. Additionally,

"[i]n rate cases, [the] Public Service Commission is recognized as the 'expert' designated by the legislature to make policy determinations regarding utility rates." *Hamm v. S.C. Pub. Serv. Comm'n*, 294 S.C. 320, 322, 364 S.E.2d 455, 456 (1988) (citing *Patton v. S.C. Pub. Serv. Comm'n*, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984)).

In this instance, other parties presented evidence that overcame the initial presumption of reasonableness to which the Company was entitled and that it failed to make every reasonable effort to minimize costs. Multiple witnesses testified that Duke's actions led to the release of coal ash into the Dan River and the subsequent enactment of CAMA. Parties presented evidence that CAMA was enacted by the North Carolina General Assembly as a direct result of the Company's action and that costs increased as a result of CAMA. Additionally, evidence was presented to the Commission that it would be unreasonable for South Carolina customers to bear these increased costs, which result from a North Carolina law and Duke's discharge of approximately 27 million gallons of coal ash wastewater and an estimated 39,000 tons of coal ash into the Dan River. According to witness Wittliff, ORS has taken the position that North Carolina laws, over which DEP's South Carolina customers have no meaningful input, should not place an additional economic burden on the ratepayers of South Carolina. (R. p. 1115-31, 11. 2-6).

Any presumption to which the Company was entitled is not dispositive. The Company's assertion that the Commission lacked a legal basis for denying its recovery of the Coal Ash Disposal costs is incorrect. The record is replete with evidence which supports the Commission's decision that recovery of the North Carolina Coal Ash Disposal costs from South Carolina ratepayers would be unreasonable. The Commission properly relied upon

substantial evidence on the whole record, which overcame the initial presumption of reasonableness, in determining it would be unreasonable for South Carolina customers to bear these Coal Ash Disposal costs.

The Company alleges that the Commission's Order results in an unconstitutional taking. The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. However, no such taking occurred here, because the Company had no property right to recovery of coal ash disposal costs. The Commission is empowered by the General Assembly to set rates, and its determination of which expenses are recoverable is a component of its ratemaking authority. Duke has cited no legal authority restricting the discretion of the Commission in determining the recoverability of the coal ash disposal expenses at issue. Because the Commission has this discretion, Duke Energy has no protected property interest in recovery of the expenses. In determining whether a protected property interest exists in the context of utility ratemaking, the focus must be on the degree of discretion given to the decisionmaker, not on the probability of the decision's outcome. *S.C. Elec. & Gas Co. v. Randall*, 333 F.Supp.3d 552, 571 (D.S.C. 2018).

The Company has also asserted that the Commission's Order violates the Commerce Clause of the United States Constitution. This is the first time the Company has raised this argument. In discussing Petitions for Reconsideration or Rehearing filed before it, the South Carolina Supreme Court stated, "[t]he purposes of a petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing is not just to have the case tried in this court a

second time." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933). While *Arnold* relates specifically to a Petition for Rehearing filed at the South Carolina Supreme Court, the guiding principal remains. *See Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (holding that an issue the utility "first broached... in its petition for rehearing to the PSC" was "not preserved."); *see* also *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct.App.1995) (a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment); *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 468 S.E.2d 633 (1996) (a party may not raise an issue for the first time in a motion for a new trial). Additionally, the Commission has previously determined that a party may not raise an issue in a petition for rehearing that could have been presented prior to judgment. The Commission's Order does not engage in economic discrimination or burden the flow of interstate commerce. South Carolina's Commission does not dictate the actions of the Company, the North Carolina Legislature, or other Commissions and has not engaged in economic discrimination or burdened the flow of interstate commerce.

The Company has also asserted that the Commission's Order violates the doctrine of equitable estoppel. There is ample evidence in the record that the North Carolina Coal Ash Costs at issue were unreasonable and should not be forced upon the Company's South Carolina ratepayers and the Commission did not violate the doctrine of equitable estoppel. Generally, "'estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy.'" *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (quoting *Greenville Cty. v.*

Kenwood Enters. Inc., 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003)). Estoppel runs against the government only in certain limited situations. In these situations, the party claiming estoppel against the government "must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." *Id.* at 236-37, 692 S.E.2d at 506. "In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct." 28 Am. Jur. 2d Estoppel and Waiver 5 27 (2011). "The essence of equitable estoppel is that the party entitled to invoke the principle was misled to his injury." *S.C. Pub. Serv. Auth. v. Ocean Forest Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). "The party asserting estoppel bears the burden of establishing all its elements." *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (quoting *Estes v. Roper Temp. Servs.*, 304 S.C. 120, 122, 403 S.E.2d 157, 158 (Ct. App. 1991)). "Absent even one element, estoppel will not lie against a government entity." *Id*. at 320, 659 S.E.2d at 267.

In this case, the Company cannot show that the Commission's disallowance of the coal ash disposal costs at issue meets any of the above-enumerated elements of estoppel. The Company itself removed certain costs attributable to CAMA and other North Carolina laws. The Company cannot now claim justifiable reliance that this Commission would allow recovery of the coal ash disposal costs. Additionally, the Commission has, in prior cases, removed from recovery costs incurred due to other states' laws that are over and above what South Carolina law requires. The Company also incorrectly claims that the Commission made factual errors. According to the South Carolina Supreme Court, "[t]he Commission

sits as the trier of facts, akin to a jury of experts." *Hamm*, 309 at 287, 422 S.E.2d at 113. While parties may present varying viewpoints, it is the Commission that tries the facts and bases its conclusion thereon. The Company lists errors that it alleges were made by ORS witness Witliff; however, it fails to connect many of these errors to the record or the Commission's analysis contained in the Order. In fact, many of the allegations cannot be substantiated by the record and are being raised for the first time in the Company's Petition for Reconsideration. The Commission is the trier of fact, and it properly weighed all evidence put before it by the parties and made a well-reasoned conclusion.

Finally, the Company alleges that the Commission's Order fails to make findings of fact or conclusions of law. This claim is without merit, as evidenced by the findings of fact and conclusions of law on pages 104-105 of the Order, which are supported by the facts and analysis presented on pages 39-52 of the Order. When making specific, express findings of fact, no particular format is required. See, *Airco Inc. v. Hollington*, 269 S.C. 152, 160, 236 S.E.2d 804, 808 (1977)). While it is true, "a recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues," that is not what the Commission has done here. *Able Commc'ns Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986).

The Commission clearly laid out and considered the evidence presented by the parties and, beginning on page 48 of its Order, detailed its analysis in reaching the conclusion that it would be unreasonable for the Company's South Carolina customers to bear the burden of these North Carolina Coal Ash Expenses. These costs directly stem from Duke Energy's negligence, would impose great costs upon South Carolina customers as a result of a law

they had no voice in, and allowing one jurisdiction's laws to impose these costs on another's ratepayers would be a departure from past Commission rulings and practice. As a result, the Commission's Order is not arbitrary or capricious, contains all required analysis and rests upon the substantial evidence in the whole record.

2. Treatment of Deferrals

The Company asserts that the Commission erred in denying a return during the deferral and/or amortization period for the expenses addressed in the following adjustments: GridSouth, Fukushima/Cyber Security (Adjustment #17), Environmental Costs (Adjustment #18), Advanced Metering Infrastructure (Adjustment #19), Customer Connect (Adjustment #30), and Grid Improvement Costs (Adjustment #35).

While the Commission previously approved the Company's requests for accounting orders to defer the expenses detailed in the Application, the Commission orders provide no guarantee to the Company for cost recovery, including a return on those expenses. ORS witness Payne testified that, per the National Association of Regulatory Utility Commissioners ("NARUC") Rate Case and Audit Manual, a company may recover prudently incurred operating expenses, without a weighted average cost of capital ("WACC") or rate base treatment.

The ORS position, which was adopted by this Commission, is that deferrals related to O&M expenses are not to earn a return, while those deferrals related to capital costs are to earn a return. Treatment of deferrals is ultimately a matter of the Commission’s discretion. The Commission has a duty to balance the needs of the public and the utility such that the public is served without the utility being disserved. This approach represents exactly such a

balance, and we decline to rehear or reconsider our ruling on the deferral treatments. This issue is more fully discussed in Commission Order No. 2019-341 at pages 95-98.

3. Return on Equity

DEP also seeks reconsideration of the Commission's ruling adopting 9.5 percent as the appropriate Return on Equity ("ROE"). The Company complains that this Commission accepted Company witness Hevert's ROE testimony as reliable in the SCE&G Consolidated Cases[1], and that having done so, it cannot now find his testimony to be unreliable here. We reject this argument.

The standards governing the Commission's determination of the appropriate ROE are not in dispute. South Carolina law requires that the Commission's determination of a fair rate of return must be documented fully in its findings of fact and based exclusively on reliable, probative, and substantial evidence on the whole record. Moreover, a utility's ROE should be commensurate with returns on investments in other enterprises having corresponding risks, and must be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.

DEP is not asking this Commission to base its decision on evidence produced in the record of this case, but to base its decision on evidence that was produced in an entirely different docket and related to an entirely different utility, largely based upon the fact that

[1] Specifically, Docket No. 2018-370-E, the SCE&G proceeding incident to the abandonment of the nuclear projects V.C. Summer Units 2 and 3, and the merger with Dominion Energy.

the two utilities presented the same expert witness, who proposed the same ROE for both, in spite of the dissimilarity of the two companies. This request is contrary to South Carolina law. DEP presented no evidence in this case to suggest that DEP and SCE&G were comparable in terms of risk such that they should be awarded the same ROE, nor could it. Indeed, DEP's own evidence suggested that its corporate parent had strong credit ratings and was financially sound, which contrasts markedly with the evidence produced in the SCE&G Consolidated Cases showing that SCE&G was at risk of bankruptcy. Moreover, the ultimate ROE awarded in the SCE&G Consolidated Cases was the result of a settlement, while this case was fully litigated. Because SCE&G and DEP did not have corresponding risks, it is logical that they would be awarded different ROEs.

Three (3) parties' witnesses pre-filed testimony that specifically addressed the issue of ROE. Robert Hevert testified on behalf of DEP, David Parcell for ORS, and Steven Chriss on behalf of Walmart. Mr. Hevert recommended a ROE for DEP of 10.75% within a range of 10.25% to 11.25%. In the Company's Application, DEP requested that the Commission approve a ROE of 10.5%. *See*, *Application of Duke Energy Progress, LLC*, Para. 24 (Nov. 8, 2018). This recommended range is clearly extraordinarily high and exceeds the afore-cited averages by approximately 100 basis points. The differential between the averages and Mr. Hevert's recommended ROE clearly supports the Commission giving greater weight to the testimonies of witnesses Parcell and Chriss.

Witness Parcell testified that DEP's ratings were generally higher than most electric utilities in the United States and that its ratings are indicative of relatively lower risk. (R. p, 801-18, ll. 6-10). DEP witness Sullivan testified that rating agencies believe that DEP

operates in a constructive regulatory environment that supports long-term credit quality and view the Company's position within the Duke Energy corporate family as credit supportive. (Direct, p. 10, ll. 6-9). DEP's witness Hevert acknowledged in testimony that he has seen no instances where a company has sought an increase in its ROE as DEP here and was granted its request in the last three to five years. (R. p. 812, ll. 19-25, p. 813, 11. 1-2). In support of its reliance on his recommendation, the Commission provided in its Order that ORS witness Parcell has provided testimony as a ROE and Cost of Capital expert witness on several occasions before this Commission since the early 1980s (R. p. 801-2, 11. 4-6) and has testified in over 570 utility proceedings in approximately 50 regulatory agencies across the United States and Canada. (R. p. 801-1, 11. 21-22, p. 801-2, l. 1). The record thus establishes that Mr. Parcell has extensive experience in calculating ROE and Cost of Capital recommendations and that the Commission was justified in placing its reliance on his expert opinion in determining an appropriate ROE. The Commission additionally fully detailed in the Order the methodologies and procedures used by Mr. Parcell in reaching his recommendation.

The substantial evidence in the record supports the Commission's decision relying on Mr. Parcell. The Order recounts that the Direct and Surrebuttal Testimonies of Mr. Parcell employed three (3) recognized methodologies to estimate DEP's Cost of Equity: the DCF, CAPM, and Comparable Earnings (CE) models. He applied each of these methodologies to two (2) proxy groups -- his own and the one developed by DEP witness Hevert -- to establish a range of 9.1% to 9.5%, with a 9.3% mid-point. (R. p. 801-3, 11. 14-16; p. 801-4, 11. 3-5). Mr. Parcell established this range based on the results of his DCF (range of 9.0% to 9.2%

with a 9.1% midpoint) and CE (range of 9.0% to 10.0% with a 9.5% midpoint) models. (R. p. 801-4, l. I). As a result of these analyses, Mr. Parcell recommended a Cost of Capital in the range of 6.73 to 6.94 %, with a midpoint of 6.84 %. (R. p. 801-4, 11. 8-9). In reaching his recommendation of a 9.3% ROE, Mr. Parcell in large part relied on the DCF model, which is an analysis of current market conditions. The DCF model relies on current stock prices in the marketplace and has traditionally been regarded by this Commission as the best indicator of the return investors require in the marketplace for investment-grade regulated utility companies. Mr. Parcell relied on the results of both his DCF and CE analyses to determine his ROE recommendation and did not include the results of his CAPM analysis, as he found that the resulting range (i.e., 6.3% to 6.6%) was too low to be practical (R. p. 801-45, 11. 18-21). Mr. Parcell thus further established the reasonableness of his recommended ROE. By excluding his CAPM analysis, Mr. Parcell evidenced an effort to produce a fair and reasonable recommendation to the Commission. Conversely, DEP witness Hevert recommended that both of his DCF analyses be given little weight by the Commission, apparently in large part due to them yielding results which he believed to be too low, and thus disadvantageous to the Company (R. p. 948-8, 11. 1-3).

The Commission also relied on Mr. Parcell's testimony which demonstrated that Mr. Hevert's analyses showed a consistent pattern of choosing data and methodologies that result in the highest possible Cost of Equity conclusions. As the Commission correctly pointed out in questioning the testimony of Mr. Hevert, the data used by Mr. Hevert was filtered to produce an inflated ROE recommendation to the benefit of the Company. The Commission additionally accepted Mr. Parcell's assertion that Mr. Hevert's use of several "factors" to

create an impression of more risk for DEP are already considered by the rating agencies and essentially resulted in Mr. Hevert "double-counting" risk in order to artificially inflate his ROE recommendation (R. p. 801-57, 11. 1-21, p. 801-58, 11. 1-2). The Commission thus provided significant justification for itsrefusal to accept Mr. Hevert's recommendation in this case.

Mr. Parcell's ROE recommendation was further supported by his testimony evidencing ROEs authorized by other regulatory bodies across the country. The Commission relied on evidence presented by Mr. Parcell that, from 2017 to 2018, ROEs allowed by regulatory jurisdictions across the United States for all electric utilities averaged 9.59% with a median ROE of 9.58% (Exhibit DCP-2, Schedule 3). This national average is only 9 basis points higher than that awarded by the Commission, but it is 116 basis points lower than Mr. Hevert's recommended 10.75% ROE.

Testimony and evidence submitted to the Commission in this proceeding, primarily through Mr. Chriss and Mr. Parcell, confirms a decline in ROEs across the country in recent years, supports the strength of market conditions, and indicates an anticipated upward trend in interest rates in the near term. These factors, along with the financial stability of DEP, strongly support the slight reduction in the national average ROE awarded by the Commission in this case. The Commission has substantial support in the record to support its discounting Mr. Hevert's ROE recommendation as biased in the Company's favor. Both Mr. Parcell's factual testimony regarding a 9.58% national average and the Commission's legitimate rejection of Mr. Hevert's biased recommendation establish that there was

substantial evidence in the record to support the Commission's assignment of a 9.5% ROE. Accordingly, we reject DEP's request for reconsideration of our ruling on this issue.

4. Coal Ash Litigation Expenses

The Company argues that it is entitled to a presumption of reasonableness of its expenditures, including litigation expenses. As a first step in the analysis and determination of cost recovery, the Company would be correct – however, that is not the end of the analysis.

> Utility is correct that it was entitled to a presumption that its expenditures were reasonable and incurred in good faith, and therefore, a showing that its expenses had increased since its last rate case could satisfy its burden of proof. Nevertheless, the presumption in a utility's favor clearly does not foreclose scrutiny and a challenge. In those circumstances, the burden remains on the utility to demonstrate the reasonableness of its costs.

Utils. Servs. of S.C., 392 S.C. at 109-10, 708 S.E.2d at 762-63 (citing *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 286-287, 422 S.E.2d 110, 112-113 (1992)).

Here, based on the substantial evidence on the whole record, the Commission properly excluded from recovery the expenses incurred in the coal ash litigation. This Commission cannot presume that the expenses a utility seeks to recover in its rates and charges are legitimate if they cannot be subjected to the scrutiny of an audit or examination. Every rate received by an electric utility must be just and reasonable. S.C. Code Ann. §58-27-810 (2015). Here, the Commission concluded that it would be unreasonable to pass these coal ash litigation expenses on to the Company's customers absent more detailed information by way of which the Commission could determine with more certainty whether recovery of these expenses from the ratepayers would be just and reasonable. Accordingly, the Commission correctly found that the Company had failed to carry its burden.

5. CertainTEED Costs Incident to Litigation

The Company argues that it is entitled to recovery of an On-Going Payment Obligation incident to litigation from the CertainTEED litigation. The CertainTEED litigation came about due to a contract dispute resulting from an contractually mandated provision of gypsum products to CertainTEED that had become uneconomic. In 2012, DEP's predecessor, Progress Energy, had agreed to sell and deliver to CertainTEED and CertainTEED agreed to purchase from Progress Energy at least 50,000 tons of Gypsum Filter Cake per month through 2029. The gypsum is a by-product of the Company's coal-fired generation in that it is produced by environmental control equipment (scrubbers) at some of the Company's coal-fired power plants. The Company had two choices with what to do with the gypsum by-product: dispose of it at a cost to customers (such as placing it in a landfill) or sell it to companies like CertainTEED, who can use the gypsum for products that they produce and then give customers the proceeds that the Company receives for those sales. The byproducts would be sold, creating an additional revenue stream for the Company and reducing the handling and disposal of waste product in landfills. These types of contracts were standard when coal was being burned in large quantities to generate power. However, as time passed, the CertainTEED contract, due to the reduction in coal being burned for power, became very expensive to comply with, and DEP attempted to reduce its minimum monthly quantity of gypsum pursuant to the contract. (Hrg. Ex. 68, p. 25). CertainTEED subsequently pursued legal action against DEP due to DEP's failure to comply with the Agreement to provide a minimum amount of gypsum. The Company subsequently settled the amount in dispute for specified damages, rather than continue performance under the

contract for a much greater financial detriment to the Company – and ultimately – the ratepayers. (R. pp. 915-17). The net benefit under the CertainTEED contract to consumers was approximately $50 Million, derived by calculating: 1) approximately $12 million in customer costs avoided for stockpile management, 2) $116 million in landfill cost avoidance savings to customers, 3) $17 million in direct revenue benefit to customers, and 4) a net subtraction of approximately $92 million from liquidated damages under the contract and associated legal fees. (R. pp. 921-25). The resulting more than $50 million in savings to customers demonstrates to us that the decision to enter into litigation and settlement with CertainTEED was strategic, reasonable, and prudent. Therefore, the costs incident to the CertainTEED litigation, an adjustment of approximately $830,000, are recoverable.

Conclusion

IT IS THEREFORE ORDERED:

1. The Commission declines to rehear or reconsider the two issues raised in the SCEUC Petition.

2. Clarification is provided for eight (8) matters raised by the Office of Regulatory Staff.

3. Satisfactory notice was issued to satisfy due process concerns regarding the proceeding in this docket.

4. Reconsideration or rehearing is denied in regard to coal ash remediation and disposal costs; treatment of deferrals; return on equity; and coal ash litigation expenses.

5. After reconsideration of the facts and circumstances, the Commission finds that the costs incident to the CertainTEED litigation were reasonable and prudently incurred, and therefore subject to recovery.

6. To the extent that this order and Order No. 2019-341 are in conflict, this order is the controlling ruling.

7. This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:

Comer H. Randall, Chairman

Justin T. Williams, Vice Chairman

(SEAL)